UNITED STATES
v.
MICHAEL SLATER

IBLA 77-585 Decided February 14, 1978

Appeal from a decision by Administrative Law Judge E. Kendall Clarke, dated August 19, 1977, declaring null and void five placer mining claims. (OR 15916.)

Affirmed.

1. Contest and Protest: Generally--Evidence: Burden of Proof--Mining Claims: Contests--Rules of Practice: Government Contests

   In a mining contest a contestee may rest at the close of the Government's case and move for a dismissal based on the Government's failure to make out a prima facie case of a claim's invalidity. If, however, the contestee goes forward and presents his own evidence, that evidence may be weighed against him notwithstanding any defects in the Government's case.

2. Mining Claims: Discovery: Generally

   A Government mineral examiner has no duty to explore beyond the claimant's current workings to verify a mineral discovery.

3. Mining Claims: Discovery: Marketability

   Establishing the marketability of a mineral deposit requires more than a showing that the mineral is theoretically marketable or intrinsically valuable. The claimant must demonstrate present continuing demand for the output of his mine.

It is not sufficient to show that attempts are being made to explore possible markets or to promote the utilization of the mineral. Past sporadic sales do not establish a market.

4. Mining Claims: Discovery: Generally

To establish a discovery, a claimant must show more than that a prudent man would explore the claim further. The claimant must show that a valuable mineral deposit has been physically exposed, and may not rely on the mere speculation that a valuable deposit will be exposed somewhere on the claim.

5. Mining Claims: Discovery: Generally

To satisfy the prudent man test, it must be shown that the expected returns from working a mining claim are commensurate with the compensation an ordinary person would expect from his labor. The subjective willingness of a claimant to subsist on a substandard income in order to work the claim does not satisfy the test where the claimant received welfare payments and grew his own food in order to survive.

APPEARANCES: Michael Slater, pro se; Elden M. Gish, Esq., United States Department of Agriculture, Office of the General Counsel, for the United States.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Michael Slater appeals from a decision by Administrative Law Judge E. Kendall Clarke, dated August 19, 1977, declaring null and void placer mining claims Plugged Nickel #1-#5. All of the claims are situated in the SW 1/4 of sec. 24, T. 39 S., R. 9 W., Willamette meridian, Josephine County, Oregon.

The Bureau of Land Management initiated this contest on behalf of the U.S. Forest Service on July 16, 1977, alleging that: "Minerals have not been found within the limits of any of the claims in sufficient quantities to constitute a valid discovery." Appellant filed a timely answer and the matter was heard on November 9, 1976, in Medford, Oregon.

Plugged Nickel #1-#4 were located August 12 and Plugged Nickel #5 August 11, 1975, along Josephine Creek within the boundaries of the Siskiyou National Forest. Appellant, who resided on the claim with his family, conducted panning operations in Josephine Creek to extract Josephinite, a nickel-iron combination valuable as a specimen mineral. (Also present was Oregonite, which differs from Josephinite in that it is less magnetic). Over a 3-year period, appellant recovered some $600 worth of Josephinite, some of which he sold to various sources, most notably the Yale University Geology Department and Ward's Scientific Supply House located in Rochester, New York. Appellant expended approximately $200 on mining equipment.

On August 18 or 19, 1/ 1975, U.S. Forest Service mining engineer Colver F. Anderson conducted an examination of Plugged Nickel #1-#5 accompanied by appellant and a Forest Service employee named Rick Flesher (Tr. 5-7, Exh. C). The examination, which lasted 2 or 3 hours, included about an hour of panning at appellant's location site. Based on this examination, Anderson issued a report (Exh. C), on November 19, 1975, in which he concluded 1) no discovery sufficient to validate the claims was demonstrated within the limits of any claims, 2) the land was nonmineral in character, and 3) appellant was not a bona fide miner trying to develop a mine. Two observations figured prominently in Anderson's conclusion. First, Anderson felt that appellant's cabin and what Anderson inferred was an artificially developed swimming hole within Josephine Creek suggested that appellant's sojourn in Siskiyou National Forest was for recreation rather than mining. Second, Anderson believed that none of the fragments of Josephinite recovered during the 1 hour panning trial were of salable quality, and that appellant's accumulated store of Josephinite was trivial (Tr. 11-12).

During the hearing, appellant and Anderson testified on the substance of Anderson's report, the nature and extent of mineralization within the claims, the market for Josephinite, appellant's activities on the claim and his life style, and the likely costs of extracting Josephinite on a commercial scale. Judge Clarke drew the following conclusions from the proceedings:

> In this case, it is clear that the Contestee does recover small amounts of a rare iron-nickel combination

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1/ Appellant, citing the Report of Mineral Examination (Exh. C), asserts the August 18 date. Mineral examiner Colver F. Anderson, who prepared the report, stated that the report did not correctly reflect his field diary.

> which has a limited market as specimen material. However, the recovery of the specimens requires such an inordinate amount of labor that no wages could be paid of any reasonable sort and result in a break-even operation. The Contestee is able to live on these claims with almost no cost, and as a consequence, he has been willing to occasionally work in the creek and recover the small pieces of Josephinite and Oregonite which he has sold. It is also clear that a prudent man, in the legal sense, would not be justified in spending his time and means with a reasonable prospect of developing a paying mine for the reason that the labor required for recovery is too great compared to recovery. Further, there was no demonstration that there was a continuing market sufficient to absorb any substantial quantity of the material if it was recovered.
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> The Contestee has failed to preponderate against the prima facie case established by the Contestant, and therefore, the Plugged Nickel #1 through #5 placer mining claims are hereby declared null and void."

Notice of Appeal was received September 28, 1977, and a statement of reasons received November 10, 1977. The Department of Agriculture filed a response December 14, 1977.

Appellant in essence, urges two grounds for reversing Judge Clarke's findings. He states, first: "The Government has not presented a prima facie case to prove that these claims are invalid." Appellant alleges in support of this ground that the Government's mineral examiner's testimony was superficial, inconsistent, biased, and untruthful. Appellant next alleges:

> Judge Clarke has not dealt with the legal issues involved * * * the Judge did not evaluate the facts and evidence of my discovery, but rather what I have done with it. He has based his decision on a requirement that the claims be worked and be profitable, rather than the requirement that a discovery be made, which is the only requirement of the law.

Appellant, in other words, contends that he has demonstrated sufficient mineralization to constitute discovery although his recovery to date has been negligible.

An examination of the record and the relevant law discloses, however, that Judge Clarke's findings are amply supported. This appeal must be denied.

Mining claims on public lands are governed by 30 U.S.C. § 22 (1976), which states: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase * * *."

Although the statute nowhere defines what is meant by the discovery of valuable mineral deposits, courts have long adhered to the so-called "prudent man test" formulated in Castle v. Womble, 19 I.D. 455, 457 (1894):

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

Chrisman v. Miller, 197 U.S. 313, 322 (1905); see also United States v. Coleman, 390 U.S. 599 (1968); Best v. Humboldt Mining Co., 371 U.S. 334 (1963); and Cameron v. United States, 252 U.S. 451 (1920).

In United States v. Coleman, supra, the Supreme Court elaborated on the prudent man test in approving the Interior Department's "marketability rule." According to the court, the purpose of 30 U.S.C. § 22 was to reward and encourage the discovery of minerals valuable in an economic sense. Thus, an important consideration in applying the prudent man test is whether the claimant can extract, remove, and market the mineral at a profit.

Where the Government seeks to contest the validity of a mining claim, it bears the initial burden of making out a prima facie case that the claimant has not met the prudent man test. Once the Government has made its prima facie case, the burden of proof shifts to the claimant who must show, by a preponderance of the evidence, that his claim is valid. United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975) cert. denied, 423 U.S. 829 (1976), rehearing denied, 423 U.S. 1008; United States v. Springer, 491 F.2d 239 (9th Cir. 1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). The Government may establish a prima facie case through the testimony of its expert that he has examined the claim and found insufficient mineralization to constitute discovery. United States v. Morton, 32 IBLA 263 (1977); United States v. Melluzzo, (supp. on judicial remand), 32 IBLA 46 (1977); United States v. McClurg, 31 IBLA 8 (1977); United States v. Arizona Mining and Refining Co., Inc., 27 IBLA 99 (1976); cf. Udall v. Snyder, 405 F.2d 1179 (10th Cir. 1968), reversing 267 F. Supp. 110 (D. Colo. 1967).

[1] As mentioned above, appellant first alleges that the Government failed to make out a prima facie case. Anderson has testified that he examined the claim and found insufficient mineralization to constitute a claim. Thus, the Government has clearly made its prima facie case unless, as appellant contends, Anderson lacked credibility as a witness. United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971).

In considering the ultimate question, i.e., the validity of the claims, we need not limit ourselves to Anderson's testimony. A contestee may rest at the close of the Government's case and move for dismissal based on the absence of a prima facie case. If, however, the contestee goes forward and presents his own evidence, that evidence may be weighed against him notwithstanding any defects in the Government's case. United States v. Rogers, 32 IBLA 77 (1977); United States v. Arizona Mining and Manufacturing Co., Inc., supra; United States v. Bechthold, 25 IBLA 77 (1976); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

An examination of the record reveals that the facts over which appellant and Anderson disagree are for the most part peripheral. 2/ On the weightiest points in contention--the availability of a market, the quantity of mineralization, and the feasibility of extraction--the parties disagree over the significance of the factual showing rather than its content. As will appear below, doubts as to the validity of appellant's claim on these issues appear as strongly in his own evidence as in the Government's. The record therefore shows a prima facie case against the validity of the claim; it is only whether a preponderance of the appellant's evidence has overcome this prima facie case that remains in issue. Thus, the burden properly must be shifted to appellant and his first contention rejected.

[2] Particularly worthy of mention is appellant's contention that Anderson performed a superficial examination of the claim site. Appellant states: "It is not possible to examine 4,356,000 feet in anything but a superficial manner in 2-3 hours." Appellant

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2/ For example, appellant and Anderson wrangle over how Josephinite was discovered (Tr. 35-36), whether appellant's "swimming hole" had artifically been enlarged (Tr. 22 et seq.), and whether appellant's cabin had a basement (Tr. 39). These disputes are of some relevance, but their significance is far outweighed by questions concerning the extent of mineralization, etc., raised in appellant's own evidence and by similar evidence in Anderson's report which appellant does not dispute.

apparently believes that the Government bears a burden of exploring the claim site to ferret out the presence of any valuable mineral deposits. The law, however, is otherwise. It is the claimant and not the Government who bears the burden of disclosing the presence of any valuable mineral deposits. A Government mineral examiner has no duty to explore beyond the current workings of a mining claimant in attempting to verify a claim discovery. See e.g., United States v. Mineral Ventures, Ltd., 14 IBLA 82 (1973); United States v. Kelty, 11 IBLA 38 (1973); United States v. Mullin, 2 IBLA 133 (1971); United States v. Hines Gilbert Gold Mines Co., 1 IBLA 296 (1971). The record reveals that Anderson examined appellant's current workings; this was sufficient.

Appellant next alleges that Judge Clarke applied improper standards in finding the Plugged Nickel claims invalid. The record discloses, however, that appellant has failed to establish the validity of his claims by a preponderance of the evidence under the prudent man test or the corollary marketability test.

Appellant has failed to show a present continuing market for significant amounts of his Josephinite. Moreover, the small quantities of Josephinite which appellant has demonstrated, and the great difficulty of extraction, makes it unlikely that a prudent person would be willing to expend time and resources on this claim.

[3] Appellant's account of the Josephinite market appears tentative. The record does show some evidence suggesting that a regular market for Josephinite indeed exists. Appellant has been able to sell what quantities of Josephinite he has attempted to market in the past and the Government's mineral examiner Anderson, admits (Tr. 13) that one Bob Cutler and others have found a "ready market" for Josephinite. These facts, however, are equivocal. No evidence appears on the record to indicate the size of the potential Josephinite market. Past sporadic sales alone cannot define a market; what must be shown is the opportunity for continuing present sales. United States v. Boyle, 76 I.D. 318 (1969); aff'd Boyle v. Morton, 519 F.2d 551 (9th Cir. 1975), cert. denied, 423 U.S. 1033. United States v. Estate of Denison, 76 I.D. 233 (1969). We cannot discern the extent of appellant's potential for such sales from the record before us.

Appellant himself does not seem to have the answer. While he has conducted some preliminary negotiations with potential buyers, considered the potential for selling to the scientific community, and attempted to promote new uses for Josephinite, he was not prepared to state concretely the extent of the present market for his Josephinite (Tr. 55-56, 63). See United States v. Osborne, 77 I.D. 83 (1970). This case has extensive late history. See United States v. Osborne, 28 IBLA 13 (1976).

Evidence of the quantities of Josephinite recovered on the Plugged Nickel claims leaves considerable doubt that commercially attractive quantities of the mineral are present. 3/ Anderson testified (Tr. 16):

There is undoubtedly some of the mineral present and on occasion, oh, a little bunch of it can be found -- a few ounces or maybe a pound or so, even, in certain situations. But it is so hard to get at it consistently that it would not be a paying operation.

Appellant's own testimony does little to contradict this assessment. He reports that in 3 years, he has recovered only about $600 worth of Josephinite working perhaps 100 days per year (Tr. 50-55, 64-65). 4/

Appellant describes only a single site, located on either 4 or 5, where he was able to extract a significant amount of Josephinite--$150-$200 worth over a 10-day period in the summer of 1976 (4-5 cubic yards of gravel) (Tr. 50-51). Elsewhere, appellant has found only "indications" of Josephinite (Tr. 61-62, 76). In particular, 14 days of excavation at one site (4-5 cubic yards of gravel) yielded practically no salable specimens (Tr. 61-62). 5/

The hour long planning test conducted by appellant and Anderson does little to bolster appellant's case. Only one specimen of substantial size was recovered and this was two-thirds serpentine matrix.

3/ We do not, however, hold that a valid mining claim cannot be based on a deposit of specimen material. See United States v. Bolinder, 28 IBLA 187, 83 I.D. 609 (1976).

4/ Specimen quality Josephinite has a conceded value of $8-$12 per ounce. Specimen quality pieces retailing at two sources (Exh. F) ranged from 1/2 to 1-3/4 inches at prices of $5-$35. Appellant's total output since his location, breaks down to approximately):

Sale of exceptional specimens to Yale	$165
Sales to Wards	90
Sales to miscellaneous individuals	75
Stolen	120
Recovered summer of 1976	160
	$610

5/ The facts present are at odds with a calculation on which Appellant relies (Tr. 52, 74, Exh. B). Assuming that the creek bed contains 8,800 cubic yards of gravel, and assuming a value of $10-$20 per cubic yard, appellant estimates that his claim contains $88,000-$176,000 worth of Josephinite. A value of $10-$20 per cubic yard throughout the creekbed appears highly speculative.

While appellant claims that Josephinite in situ, as opposed to pure Josephinite would be salable, he refers to exceptional sales to geologists and not to the general specimen market (Tr. 26 et seq.). Thus, the amount of marketable Josephinite present even at appellant's richest location appears somewhat uncertain.

[4] In the last analysis, appellant's willingness to continue working the Plugged Nickel claims depends to an inordinate degree on his hopes and speculation that rich Josephinite deposits lie undiscovered on his claim. Appellant refers, for example, to the general mining activity in the region (Tr. 33), expectations that richer deposits of Josephinite theoretically lie deeper than he has probed (Tr. 41), and the observation that placer deposits tend to contain rich sections distributed erratically through the deposit (Tr. 62). Such speculation cannot be the foundation for a valid claim. See United States v. Grigg, 8 IBLA 331 (1972); United States v. Gunsight Mining Co., 5 IBLA 62 (1972); United States v. Duvall, 65 I.D. 458 (1958). The prudent man test applies only after a mineral deposit has been physically exposed. That a prudent man would be justified in conducting further exploration for a valuable mineral deposit does not validate a claim, Barton v. Morton, 498 F.2d 288 (9th Cir. 1974). But this is all that appellant has really alleged. 6/

Not only does the amount of Josephinite present on the claims appear small, but that which is there can be extracted only with a disproportionate amount of labor. It is undisputed that the material in Josephinite Creek is approximately two-thirds boulders (Tr. 74), and that boulders and gravel must be removed by hand or hand operated machinery, since tractors and the like would be torn to pieces (Tr. 13, 26). When the amount of Josephinite present on appellant's claim and the difficulty of its extraction are considered together, it becomes apparent that the returns from working the Plugged Nickel claims would not satisfy a prudent man. Working entirely by hand at his richest location, appellant has been able to demonstrate a maximum return of only $15-$20 per day of hard labor, with an average return over 3 years of only about $2 per day. Appellant did not seriously contest Judge Clarke's suggestions that appellant could earn more at unskilled labor than at mining (Tr. 66), that no miner could be induced to work for the earning that the Plugged Nickel mine would likely yield, and that appellant's willingness to work the Plugged Nickel mine depended on the fact

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6/ When asked what his future intentions were, appellant replied: "I intend to mine the ground and I can only go at it in one place at a time and whatever I find there or don't find there will then lead me on or--lead me to another hole. Its hard to say" (Tr. 67).

that by living on his claim he incurred virtually no expenses (Tr. 54, 57). Nor is it disputed that appellant received welfare payments and foodstamps while working his claim (Tr. 54). Appellant replies only that he considers his way of life "prudent" (Tr. 67).

[5] This, however, is not what the law means by "prudent." The prudent man test is an objective not a subjective standard. The value that an ordinary person would expect to receive for his labor must be taken into account, while the willingness of a claimant to subsist on unusually low remuneration must be disregarded, see United States v. Reynders, 26 IBLA 131 (1977); United States v. Arcand, 23 IBLA 226 (1976); United States v. Heard, 18 IBLA 43 (1974); United States v. Stocker, 10 IBLA 158 (1973); United States v. Harper, 8 IBLA 357 (1972); United States v. Mortenson, 7 IBLA 123 (1972); United States v. White, 72 I.D. 522 (1965). Appellant has shown only a subjective willingness to "go it alone with his family, he has not shown the prospects of objectively reasonable compensation or an economically valuable mine.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Martin Ritvo
Administrative Judge

We concur:

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Frederick Fishman
Administrative Judge

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Douglas E. Henriques
Administrative Judge